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OCT 7 - 2004

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No. 04-183

In the Supreme Court of the United States

FRANK IACABONI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The principal federal money laundering statute, 18 U.S.C. 1956(a)(1) (2000 & Supp. I 2001), makes it a crime, *inter alia*, to engage in a financial transaction using the "proceeds" of certain specified unlawful activities with "the intent to promote the carrying on" of those activities. The questions presented are:

1. Whether "proceeds" under the money laundering statute, 18 U.S.C. 1956(a)(1), means the gross receipts from the unlawful activities or only the profits, *i.e.*, gross receipts less expenses.

2. Whether petitioner, who pleaded guilty to a money laundering offense, intended to promote the carrying on of a gambling business by making payments to winning bettors.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 363 F.3d 1. The opinion of the district court (Pet. App. 14-42) is reported at 221 F. Supp. 2d 104.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2004. A petition for rehearing was denied on May 6, 2004 (Pet. App. 43-44). The petition for a writ of certiorari was filed on August 4, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiring to conduct an illegal

gambling business, in violation of 18 U.S.C. 371; operating an illegal gambling business, in violation of 18 U.S.C. 1955; conspiring to conduct an illegal gambling business involving interstate travel, in violation of 18 U.S.C. 371; conspiring to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i); and committing money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i).

The district court subsequently held a bench trial on allegations in the indictment seeking the forfeiture, under 18 U.S.C. 982(a)(1) (Supp. I 2001), of any property "involved in" the money laundering offense. The court sentenced petitioner to ten months of imprisonment, to be followed by a three-year term of supervised release, and fined him $30,000. In addition, the court ordered petitioner to forfeit $384,245. Pet. App. 42. The court of appeals reversed with respect to one item covered by the forfeiture order and affirmed the order in all other respects. *Id.* at 1-13.

1. From 1995 through March 1998, petitioner ran an illegal sports gambling operation in and around Leominister, Massachusetts. His operation included several "offices" headed by individuals to take bets over the telephone. Petitioner also ran a "football" ticket business, in which bettors paid between $1 and $10 for "tickets" allowing them to bet on upcoming games. Pet. App. 1-2. Petitioner's operation owed approximately $15,000 to $20,000 to winning bettors during a bad week, and collected approximately $20,000 to $25,000 from losing bettors during a good week. *Id.* at 3.

2. The federal money laundering statute at issue here makes it a crime when anyone,

> knowing that the property involved in a financial transaction represents the proceeds of some form of

> unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or * * *
>
> (B) knowing that the transaction is designed in whole or in part —
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

18 U.S.C. 1956(a)(1). In essence, subsection (A)(i) prohibits transactions involving the proceeds of specified crimes to promote any of those crimes, and subsection (B)(i) prohibits transactions involving the proceeds to conceal the fact that they are the product of crime.

The money laundering statute defines "specified unlawful activity" to include, among a variety of other offenses, the racketeering acts enumerated in 18 U.S.C. 1961(1) (2000 & Supp. I 2001). See 18 U.S.C. 1956(c)(7)(A). The racketeering offenses listed in Section 1961(1) in turn include the running of an illegal gambling business, in violation of 18 U.S.C. 1955. See 18 U.S.C. 1961(1) (2000 & Supp. I 2001).

Under 18 U.S.C. 982(a)(1) (Supp. I 2001), "[t]he court, in imposing sentence on a person convicted of an offense in violation of section 1956 * * * of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." Thus, under Section 982(a)(1), a person must forfeit any property "involved in" a money laundering offense.

3. a. Among other charges, petitioner pleaded guilty to Count 4 of the indictment, which charged him with entering a conspiracy to launder money, from approximately 1995 until March 1998, in violation of the promotion subsection of the money laundering statute, Section 1956(a)(1)(A)(i). C.A. App. 21. Count 4 alleged that petitioner, "knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity, knowingly and intentionally * * * conspired * * * to conduct financial transactions" with gambling proceeds "with the intent to promote the carrying on of such specified unlawful activity." *Ibid.* Count 4 identified the financial transactions promoting the illegal gambling business as "a) pa[ying] cash representing winning wagers to their gambling customers; b) pa[ying] their agents for the amount of gambling action taken by those agents; c) pa[ying] salaries to other individuals; d) purchas[ing] equipment for the gambling business, including telephones and fax machines; and e) pa[ying] rent or ma[king] other cash payments to secure the use of locations in which to take phone calls from bettors." *Id.* at 22-23. In pleading guilty, petitioner "expressly and unequivocally admit[ted] that he in fact knowingly and intentionally committed the crimes charged in Counts One through Four of the Indictment, and [was] in fact guilty of those offenses." 3/26/02 Plea Agreement 1, 10; see 3/26/02 Tr. 16-17, 28-29 (plea colloquy). In the plea agreement, petitioner and the United States agreed to a bench trial on whether certain property and funds were subject to forfeiture as "involved in" the money laundering conspiracy. Pet. App. 14.

b. At the bench trial, the district court heard testimony from, among others, two of petitioner's "phone men," who ran gambling "office[s]" for petitioner and

registered bets from gamblers over the phone. Pet. App. 16-17. The district court found that petitioner "provided each phone man working for him with a list of gamblers who were permitted to place bets." *Id.* at 16. Petitioner also paid the phone men "salaries," reimbursed them for their phone bills, and provided them with a fax machine. *Ibid.* The district court further found that "[w]inners were paid with the proceeds of the illegal gambling business." *Id.* at 18. The district court concluded that these payments "were intended 'to promote the carrying on of the specified unlawful activity.' Nothing makes an illegal gambling operation flourish more than the prompt payment of winners." *Id.* at 32.

The district court ordered petitioner to forfeit a total of $384,245. Pet. App. 42. The amounts forfeited as "involved in" the money laundering conspiracy charged in Count 4 included $340,000 paid to winning phone-in bettors over the 1996 and 1997 football seasons (*id.* at 40-41), $10,000 paid to winning football ticket bettors (*id.* at 41-42), $16,750 in salaries and operating expenses (*id.* at 39-40), and $7495 in payments from a losing bettor that petitioner had deposited into his personal bank account (*id.* at 39).[1]

4. a. On appeal, petitioner did not challenge his conviction on Count 4 for conspiracy to commit promotional money laundering. Instead, he challenged only the district court's forfeiture order arguing, among other things, that the district court erred in ordering the

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[1] The forfeiture amount also included $10,000 cash forfeited as a result of petitioner's pleading guilty to an information charging concealment money laundering, pursuant to 18 U.S.C. 1956(a)(1)(B)(i), with respect to one particular transaction. Pet. App. 38.

forfeiture of amounts he paid to winning bettors. Pet. C.A. Br. 10-23. As petitioner described it, "[t]he gist of this argument [was] that paying winning bettors is an essential part of the operation of a gambling business and, without more, does not constitute money laundering." *Id.* at 10-11.

In making that argument, petitioner discussed *United States* v. *Scialabba*, 282 F.3d 475, cert. denied, 537 U.S. 1071 (2002), in which the Seventh Circuit defined "proceeds" within the meaning of the money laundering statute as "net income." See Pet. C.A. Br. 20-22. Petitioner did not, however, press the First Circuit to adopt *Scialabba*'s holding that "proceeds" must be "net income." To the contrary, he assured the court of appeals that the district court's concern "that money laundering could not occur absent a net profit under *Scialabba*, was misplaced in light of [the First Circuit's] holding in *LeBlanc*." *Id.* at 22 (citing *United States* v. *LeBlanc*, 24 F.3d 340, cert. denied, 513 U.S. 896 (1994)). And, in accord with his argument that promotional money laundering required some "extra step" beyond the ordinary operation of the illegal gambling business, and in contrast to the holding of the Seventh Circuit, petitioner defined "proceeds" as funds "derived from the already completed offense or a completed phase of an offense." *Id.* at 18 & n.6.

In its response, the government argued that petitioner could not challenge the forfeiture order based upon the meaning of the money laundering statute. The government contended that, in pleading guilty, petitioner had admitted that the financial transactions in the indictment, including his payments to winning bettors, constituted the use of illegal proceeds with the specific intent to promote his illegal gambling operation. Gov't C.A. Br. 17-19 (citing *United States* v.

Broce, 488 U.S. 563, 570 (1989)). The government also argued that there was ample evidence that the payments to winning bettors were "involved in" money laundering such that they were forfeitable under 18 U.S.C. 982(a) (2000 & Supp. I 2001). *Id.* at 28.

In reply, petitioner contended that his guilty plea did not waive his challenge, claiming that his argument was grounded on the proposition that, if Count 4 had charged only payments to winning bettors, Count 4 would not have alleged an offense and the district court would have been without jurisdiction to accept the plea, and thus without jurisdiction to enter the order forfeiting those payments. Pet. C.A. Reply Br. 2-3.

b. Without addressing the waiver issue, the court of appeals rejected petitioner's arguments, with one exception. Pet. App. 1-13.[2] The court of appeals understood petitioner to be relying upon *Scialabba* to "argu[e] that 'proceeds' refers to net income of the illegal gambling operation, not payouts." *Id.* at 6. The court of appeals acknowledged that the Seventh Circuit's *Scialabba* decision defined "proceeds" within the meaning of the money laundering statute as "profits." Pet. App. 7. The court noted, however, that it previously had rejected that interpretation of the term "proceeds" in the RICO context. *Ibid.* (citing *United States* v. *Hurley*, 63 F.3d 1, 21 (1st Cir. 1995), cert. denied, 517 U.S. 1105 (1996)). The court concluded that

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[2] The court of appeals reversed the district court only insofar as that court determined that the $7495 in checks that petitioner had deposited in his personal checking account were forfeitable. The court of appeals concluded that, in forfeiting the amount of the checks, the district court improperly relied upon a theory of concealment money laundering, 18 U.S.C. 1956(a)(1)(B)(i), with which petitioner had not been charged with respect to those checks. Pet. App. 12-13.

petitioner had provided "no rationale" for abandoning that approach here. *Ibid.* Except for one aspect of the forfeiture not at issue here, the court then rejected petitioner's remaining arguments, including his argument that, because payments to winning bettors were an integral part of the illegal gambling operation, they could not be considered "promotion" of the operation. *Id.* at 7-10.

ARGUMENT

Petitioner seeks review on the question "whether payments to winning gamblers during the operation of an illegal gambling business constitutes the separate offense of promotional money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i)." Pet. i. He contends that the decision below conflicts with the Seventh Circuit's holding in *United States* v. *Scialabba*, 282 F.3d 475, cert. denied, 537 U.S. 1071 (2002), that "proceeds" in the money laundering statute means "net profits," rather than gross receipts, Pet. 8-10, and that he lacked the intent to engage in promotional money laundering by making payments to winning bettors. *Id.* at 16-17. The court of appeals correctly rejected the notion that "proceeds" means "net profits," and although there is a conflict in the circuits on that question, further review of that issue is not warranted on the facts of this case. And petitioner's fact-specific challenge to his intent to promote his gambling business, which he admitted in pleading guilty, does not present an issue warranting further review.

1. The circuits are divided on the meaning of the term "proceeds" in the federal money laundering statute. The First Circuit's ruling in this case that the word "proceeds" means gross receipts and not profits is consistent with the Third Circuit's decision in *United*

States v. *Grasso*, No. 03-1441, 2004 WL 1874620 (Aug. 23, 2004). In *Grasso*, the defendant was convicted, under 18 U.S.C. 1956(a)(1)(A)(i), of laundering the proceeds of a fraudulent work-at-home scheme by reinvesting the proceeds of his criminal activity to purchase advertising, telephone services, printing, envelopes, and other materials in furtherance of the scheme. On appeal, the defendant contended that the evidence failed to support his money laundering conviction because it did not show that the allegedly laundered funds represented "net profits" of the fraudulent scheme rather than "gross receipts or revenue." 2004 WL 1874620, at *3. The court of appeals rejected that claim, holding that "'proceeds,' as that term is used in § 1956, means simply gross receipts from illegal activity. An individual may engage in money laundering regardless whether his or her criminal endeavor ultimately turns a profit." *Id.* at *7.[3]

The definition of "proceeds" adopted by the court below is also consistent with the definition used by the Sixth Circuit. In *United States* v. *Haun*, 90 F.3d 1096, 1101 (1996), cert. denied, 519 U.S. 1059 (1997), the Sixth Circuit rejected a due process challenge to Section 1956(a)(1)(A)(i) that was based on the contention that the word "proceeds" is unconstitutionally vague. The court of appeals held that "proceeds" is not unconstitutionally vague because it "is a commonly understood word in the English language" that includes "what is produced by or derived from something (as a sale, investment, levy, business) by way of *total revenue*." *Ibid.* (emphasis added) (quoting *Webster's Third New*

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[3] Although the Third Circuit reviewed the defendant's claim for plain error, it noted that it "would affirm even under *de novo* review." 2004 WL 1874620, at *4.

International Dictionary 1807 (1971)). Accord *United States* v. *Prince*, 214 F.3d 740, 747 (6th Cir.), cert. denied, 531 U.S. 974 (2000); see *United States* v. *Monaco*, 194 F.3d 381, 385-386 (2d Cir. 1999) (rejecting vagueness challenge to the word "proceeds" in Section 1956(a)(1) and quoting *Haun*, 90 F.3d at 1101, for the proposition that "'[p]roceeds' is a commonly understood word in the English language"), cert. denied, 529 U.S. 1028 (2000).

As both the court below (Pet. App. 6-7) and the *Grasso* court (2004 WL 1874620, at *5) explicitly recognized, however, the Seventh Circuit has taken the contrary view, defining the word "proceeds" in the money laundering statute as "profits." In *Scialabba*, the defendants provided video poker and slot machines to bars, restaurants, and other retail outlets. Each week they opened the machines and collected any deposited money, which they then used to reimburse the outlet owners for payments to winning customers, to pay the outlet owners for their role, to lease the gambling machines, and to obtain the amusement licenses necessary to operate the machines. See *Scialabba*, 282 F.3d at 476. For these expenditures, they were convicted of laundering the proceeds of an illegal gambling operation, in violation of 18 U.S.C. 1956(a)(1)(A)(i). The court of appeals vacated the money laundering convictions on the ground that "proceeds" in the statute means "profits" and that funds used to cover the overhead expenses of an illegal activity are not "proceeds" under that definition. 282 F.3d at 477. That decision is irreconcilable with the holding of the court below that "proceeds" are not limited to profits for purposes of the money laundering statute. In a more recent case involving the meaning of the word "proceeds" in the RICO forfeiture provision, 18 U.S.C. 1963(a)(3), the

Seventh Circuit, citing *Scialabba*, reaffirmed its view that "proceeds" means "profits." *United States* v. *Genova*, 333 F.3d 750, 761 (2003).[4]

2. The conflict over the definition of "proceeds" in the money laundering statute raises an issue of recurring importance that warrants the Court's review in an appropriate case. Indeed, the government petitioned for a writ of certiorari in *Scialabba* in order to obtain resolution of that issue. This Court, however, denied the petition. 537 U.S. 1071 (2002) (No. 02-442). At that time, the disagreement in the circuits over the meaning of the word "proceeds" in the money laundering statute was not as pronounced as now. In an appropriate case, therefore, resolution by this Court of the conflict on the meaning of the word "proceeds" would be warranted. But this case is not a suitable vehicle for review of that question.

First, as described above, see pp. 5-7, *supra*, petitioner did not challenge on appeal his *conviction* for conspiring to commit money laundering, a charge to

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[4] Contrary to petitioner's contention (Pet. 11-12), the decision below does not conflict with *United States* v. *Conley*, 37 F.3d 970 (3d Cir. 1994). There, one of the defendants contended on appeal that using the receipts of an illegal video poker operation to pay employees and to purchase additional machines was intrinsic to the gambling business and therefore could not constitute the separate crime of money laundering. Rejecting that claim, the court of appeals held that "the money, once collected from the poker machines, became 'proceeds of specified unlawful activity' within the meaning of the money laundering statute. Accordingly, any subsequent financial transaction involving these proceeds that promotes or furthers the illegal gambling business could form the basis of a charge of money laundering." *Id.* at 980. The result and reasoning in *Conley* are consistent with the Third Circuit's subsequent decision in *Grasso*, as the *Grasso* court specifically noted. 2004 WL 187620, at *7.

which he pleaded guilty. Nevertheless, he challenged the *forfeiture* order in the court of appeals on the ground that the financial transactions to which he admitted were insufficient to prove promotional money laundering. As the government argued below, that tactical decision presents a threshold procedural question, not addressed by the court of appeals, concerning whether petitioner's guilty plea prevents him from challenging the forfeiture order on the ground that his conduct was not a crime. In pleading guilty, petitioner knowingly and voluntarily admitted to making payments to winning bettors, and he admitted that those payments constituted money laundering specifically intended to promote his illegal gambling operation. That plea bars his current challenge. See *United States* v. *Broce*, 488 U.S. 563, 570 (1989) (holding that pleading guilty admits guilt both of the discrete acts charged in the indictment and of the substantive crime).

Second, unlike *Scialabba* or *Grasso*, this case directly involves the forfeiture statute, 18 U.S.C. 982(a)(1) (Supp. I 2001), rather than the substantive money laundering statute, 18 U.S.C. 1956(a)(1). As long as petitioner's payments to winning bettors were "involved in" the money laundering offense within the meaning of 18 U.S.C. 982(a)(1) (Supp. I 2001), those payments need not themselves be "proceeds" within the meaning of the money laundering statute to be forfeitable. Thus, for example, even if only a portion of the payments constituted "proceeds," the payments were forfeitable in their entirety pursuant to 18 U.S.C. 982(a)(1) (Supp. I 2001). See, *e.g.*, *United States* v. *Real Prop. Known as 1700 Duncanville Road*, 90 F. Supp. 2d 737, 741 (N.D. Tex. 2000) (holding in civil forfeiture proceeding that real property was forfeitable in its entirety, even though only a portion of the money used

to buy the property was proceeds of food stamp fraud, because the purchase of the property was itself a money laundering offense), aff'd, 250 F.3d 738 (5th Cir. 2001) (Table); *United States* v. *One 1987 Mercedes Benz 300E*, 820 F. Supp. 248, 252 (E.D. Va. 1993) (holding in civil forfeiture proceeding that, where car payment is a money laundering offense, car is forfeitable in its entirety as "involved in" the money laundering offense even if legitimate funds were used to make other payments); see also, *e.g.*, *United States* v. *Tencer*, 107 F.3d 1120, 1134-1135 (5th Cir.) (upholding forfeiture of both legitimate and illegitimate funds as "involved in" money laundering, where legitimate funds "facilitated" money laundering offense), cert. denied, 522 U.S. 960 (1997). Accordingly, although the case was not argued or resolved on these grounds in the courts below, even assuming that "proceeds" in the money laundering statute means "profits," the payments to the winning bettors could still be found forfeitable.

Finally, although petitioner did raise the "'proceeds' means 'profits'" theory in the district court (Pet. Request for Findings of Fact & Rulings of Law 12-15, 20), in the court of appeals, petitioner did not press with clarity the position he now advocates, *i.e.*, that "proceeds" means "net profits." To the contrary, petitioner assured the court of appeals that his interpretation of the money laundering statute would not result in the statute's application only to profitable illegal enterprises, Pet. C.A. Br. 22, and specifically defined "proceeds" in a way more consistent with the view of the government than with that of the Seventh Circuit. *Id.* at 18 n.6 (defining "proceeds" as funds "derived from the already completed offense or a completed phase of an offense"). That may explain the lack of an extended

discussion of this issue by the court of appeals.[5] Because the court of appeals did pass on the meaning of "proceeds," Pet. App. 6-7, this Court's practice does not bar review. See, *e.g.*, *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002). But if the Court were to grant review here, it would be doing so without the benefit of a thorough discussion by the court below of the "proceeds" issue. *Cf. Grasso*, 2004 WL 1874620, at *4-*7.

3. If the Court decides to grant review in this case, the petition should be granted limited to the first question as framed in the government's opposition. The bulk of petitioner's arguments (Pet. 7-16) turn on whether "proceeds" in the money laundering statute means "profits," and that is the issue upon which the circuits are divided.

The petition's question presented, however, raises more generally the requirements for satisfying the promotional subsection of the money laundering statute. Pet. i. Consistent with that broader question, petitioner briefly raises at the end of his petition (Pet. 16-17) an attack on the sufficiency of the evidence to support his specific intent to promote the illegal gambling business. See 18 U.S.C. 1956(a)(1)(A)(i) (requiring "the intent to promote the carrying on of specified unlawful activity"). That question is framed as the second question presented in this brief.

Petitioner points to no conflict among the circuits with respect to the "specific intent to promote" requirement. Indeed, the Seventh Circuit has rejected

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[5] Petitioner directly argued that "proceeds" means "profits" for the first time in the court of appeals in his rehearing petition (see Pet. Petition for Reh'g & Suggestion for Reh'g En Banc 5-7), which the court of appeals summarily denied (Pet. App. 43-44).

such an argument on very similar facts. In *United States* v. *Febus*, 218 F.3d 784, cert. denied, 531 U.S. 1021 (2000), the Seventh Circuit held that a defendant's "payments to winning players promoted the bolita's continuing prosperity by maintaining and increasing the player's patronage" of the illegal lottery, and thus satisfied the money laundering statute's promotion requirement. *Id.* at 789-790.

Furthermore, the promotion issue is a factbound one not warranting this Court's review. Petitioner argues that "[p]ayments to winning gamblers are no more promotion than delivering a vehicle promotes a car sales business." Pet. 17. But, here, petitioner admitted (Pet. App. 15), and the district court found (*id.* at 32), that his payments to winning gamblers were intended to promote his illegal gambling business. Petitioner ran an ongoing gambling operation based on repeat customers. Petitioner had a set list of customers who were permitted to place bets. *Id.* at 16-17. As the district court found, "[n]othing makes an illegal gambling operation flourish more than the prompt payment of winners." *Id.* at 32. And, as the district court further observed, there is nothing fundamentally unfair about "view[ing] as money laundering the conduct of defendant that took the proceeds of his illegal business and used them to increase the popularity and viability of his criminal operation by paying his winners." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2004